STATE OF MICHIGAN

COURT OF APPEALS

VICKI LYNN MARION, Personal Representative of the Estate of MARK MARION, Deceased,

Plaintiff-Appellee,

v

LEROY CONNER, JOHN TAKACH, and GENERAL MOTORS CORPORATION,

Defendants-Appellants.

UNPUBLISHED
February 14, 2003

No. 233695
Kent Circuit Court
LC No. 98-011670-NI

Before: Sawyer, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

In this intentional infliction of emotional distress claim, defendants appeal by leave granted the trial court's denial of their motion for summary disposition. We affirm in part and reverse in part.

Defendants first claim that plaintiff's intentional infliction of emotional distress claim is preempted by the Labor Management Relations Act (LMRA), 29 USC 1 *et seq.*, because resolution of the claim requires reference to and interpretation of the collective bargaining agreement.

We review a trial court's decision on an MCR 2.116(C)(4) motion de novo.[1] *Manning v Amerman*, 229 Mich App 608; 582 NW2d 539 (1998). When reviewing the decision, we determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law or whether the affidavits and other proofs show that there was no genuine issue of material fact as it relates to the issue of jurisdiction. *Id*. at 610; *Sargent v Browning-Ferris Industries*, 167 Mich App 29, 33; 421 NW2d 563 (1988); MCR 2.116(G)(2); MCR 2.116(I)(1).

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[1] Although defendants brought their motion under MCR 2.116(C)(10), they claimed that the trial court did not have subject matter jurisdiction over plaintiff's claim. Thus, we will consider the matter as if the motion had been brought under MCR 2.116(C)(4). See *Brown v Drake-Willock Int'l*, 209 Mich App 136, 143; 530 NW2d 510 (1995); *Ellsworth v Highland Lakes Development Associates*, 198 Mich App 55, 57-58; 498 NW2d 5 (1993).

Whether a state-law claim is preempted by federal law is a question of federal law. *Betty v Brooks & Perkins*, 446 Mich 270, 276; 521 NW2d 518 (1994), citing *Allis-Chalmers Corp v Lueck*, 471 US 202, 214; 105 S Ct 1904; 85 L Ed 2d 206 (1985). When this Court considers a federal question, we follow the prevailing opinions of the United States Supreme Court. *Id.*, citing *Harper v Brennan*, 311 Mich 489, 493; 18 NW2d 905 (1945).

29 USC 185(a), or § 301, states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. [29 USC 185(a).]

The United States Supreme Court delineated a test for § 301 preemption in *Lueck*, *supra*, 471 US 202. The Court stated that to give the statute its full effect, preemption must "extend beyond suits alleging contract violations." *Id.* at 210. The Court reasoned that collective bargaining agreements must be interpreted in a uniform and predictable fashion, which can only be accomplished by requiring collective bargaining agreement-related claims to be litigated under the terms of federal law. *Id.* at 211.

However, "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal law," because parties cannot bargain for what is illegal under state law to avoid the effect of the state law. *Id.* Thus, when a claim is based on "state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract," those claims are not preempted by the federal statute. *Id.* at 212. The seminal inquiry is "whether evaluation of the [] claim is inextricably intertwined with" or "substantially dependent" on the terms of the collective bargaining agreement, *id.* at 213, 220, or whether the collective bargaining agreement must be interpreted to resolve the state-law claim. *Lingle*, *supra*, 486 US at 413.

In Michigan, a plaintiff must prove the following elements to succeed on a claim of intentional infliction of emotional distress: "(1) 'extreme and outrageous' conduct, (2) intent or recklessness, (3) causation, and (4) 'severe emotional distress.'" *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 374 NW2d 905 (1985), quoting Restatement Torts, 2d, § 46, p 71.

Here, plaintiff claimed that the decedent, Mark Marion, was threatened and intimidated by Leroy Conner when Conner "committed deliberate acts designed specifically to cause" emotional distress. Plaintiff alleged that Conner accomplished the intimidation by increasing Marion's workload, taking tools from him, spying on him, subjecting him to intolerable working conditions, threatening him with bodily harm, intimating that Conner kept weapons handy as management tools, and following him off the work site.

Defendants argue that it is impossible to determine whether Conner's acts were "extreme or outrageous" without referring to what behavior was permitted by the collective bargaining agreement. However, plaintiff does not deny that Conner had the authority act in certain ways,

such as assigning jobs. Rather, plaintiff claims that despite what Conner was allowed to do, his actions were taken specifically to intimidate Marion. Thus, it was Conner's motive in allegedly assigning job packages to harass employees for his own personal purposes that was in question.

Because the court does not need to refer to the collective bargaining agreement to determine Conner's motives, we agree with the trial court that plaintiff's claim is not preempted by § 301. See *Lueck, supra*, 471 US at 212; *Lingle, supra,* 486 US at 413. Moreover, some of the claimed acts—such as threatening the decedent with weapons—could not be permitted by collective bargaining. *Lingle, supra*, 486 US at 413.

Next, defendants claim that the only evidence plaintiff has to support her claim is inadmissible hearsay. When deciding a motion for summary disposition under MCR 2.116(C)(10), a court cannot make findings of fact. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). The court's job is merely to "review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial." *Id.* The moving party has the burden to bring evidence showing that there are no disputed facts. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). "The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

The court is liberal in finding a genuine issue of material fact. *Marlo Beauty v Farmers Ins*, 227 Mich App 309, 320; 575 NW2d 324, lv den 459 Mich 954 (1998). Only where the nonmoving party fails to bring evidence showing that disputed facts exist should the motion be granted. *Id.* at 363. However, only admissible evidence may be considered to determine whether a genuine issue of material fact exists. MCR 2.116(G)(6); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2000).

Denying defendants' motion for summary disposition, the trial judge stated that he was "leaving aside determination of what is admissible or inadmissible evidence." Failing to determine whether the evidence was admissible before making a ruling on the motion for summary disposition was error. Furthermore, because the trial court did not resolve the issue of admissibility, we decline to do so for the first time on appeal. Rather, on remand, the trial court shall resolve the issue of the admissibility of the evidence relied upon by plaintiff to establish a genuine issue of material fact.

The trial court's order denying summary disposition is vacated and the matter is remanded to resolve the issue of admissibility of plaintiff's evidence. On remand, the trial court shall deny defendant's motion only if it determines that plaintiff has established a genuine issue of material fact through evidence which will be admissible at trial.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, neither side having prevailed in full.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Pat M. Donofrio